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## THE POWER OF AN ADMINISTRATOR WITH THE WILL ANNEXED OVER HIS TESTATOR'S REAL ESTATE.

IN many of the states of the Union, there are statutes granting powers to and imposing duties upon administrators *cum testamento annexo*, with regard to the care and disposition of the real estate of the testator. While this power and authority is purely statutory in its character, still there are certain general features that prevail in most all of these statutes, so that it is a subject that is of more than local importance. There is no collection or statement of the decisions of the different courts construing and applying these statutes, so far as this writer knows. It is the purpose of this article to present a few points on this matter.

§ 1. *Authority of Executors and Administrators at Common Law over Decedent's Realty.*—At common law an administrator took no interest in the real estate of the decedent, nor did an executor, unless by force of the provisions of his testator's will. An administrator is merely the agent or trustee of the estate of the decedent, acting immediately under the direction of the law prescribing his duties, regulating his conduct, and limiting his power: *Collamore v. Wilder*, 19 Kans. 67, 78; s. c. 17 Am. L. R. (N. S.) 135. He has no authority over the realty of the intestate except to sell in pursuance of an order of sale properly issued by a court of competent

jurisdiction. Having no general authority, he must strictly comply with the law: *Broadwater v. Richards*, 4 Mont. 80, 84.

An executor and administrator at common law, after the granting of letters of administration, had essentially the same powers: Wms. on Ex'r's 610. But these powers pertaining to the respective offices, only extended to the personal estate. So, it has been held, that an administrator as such cannot maintain a bill in equity to remove a cloud from the title to realty: *Smith v. McConnell*, 17 Ill. 135. Nor is he authorized, in the ordinary course of administration, to lease the real estate of his intestate: *Terry v. Ferguson*, 8 Port. 500. Neither can an executor, as such, sell the lands of his testator, unless directed to do so by his will: *Lippincott's Ex'r v. Lippincott's Ex'r*, 4 C. E. Green 121; s. c. 8 Am. L. Reg. (N. S.) 127. Nor can executors make a dedication of their testator's realty, for the purposes of a street, in the absence of authority conferred by the will, or an order and decree authorizing such disposition of the testator's realty given by a court of competent jurisdiction: *Kaim v. Harty*, 73 Mo. 316. So where an executrix brought an action for an alleged trespass upon her testator's land, the same was dismissed, the court saying "the real estate of a deceased person descends, upon his death, to his heirs or passes to the devisees under his will." By the common law, the personal representative, whether executor or administrator, takes no interest in it: *Aubuchon v. Lory*, 23 Mo. 99. And to the same point, generally, see *Leavens v. Butler*, 8 Port. 389; *Chighizola v. Le Baron's Ex'r*, 21 Ala. 410; 1 Williams on Ex'rs 650, n. (D 1), and 1 Perry on Trusts, 3d ed. § 262.

§ 2. *Authority of Administrators, c. t. a., at Common Law, over Decedent's Realty.*—An administrator *c. t. a.* is a person appointed by the court to administer the testator's estate, in cases where he has appointed no executor, or where the appointment fails: Williams on Ex'rs 461. While it is true, generally, that an administrator *c. t. a.* succeeded to all the powers and rights, and was charged with all the duties which by the testator's will were imposed upon an executor, still, as already shown, an executor, *virtute officii*, took no interest in, or power or authority over his testator's realty, unless he was vested with it by the language of the will. Therefore, at common law, the administrator *c. t. a.* only succeeded to that power and authority, and was only charged with those duties which pertained to the office of an executor, *as such*, and affected only

the control and disposition of the personal estate of the testator. So, "where testator directed his lands to be sold by his executors, this was a personal trust; and as the executors renounced, there was no one by whom the duty could be fulfilled. A sale by administrators *c. t. a.* was altogether unauthorized and void: *McDonald v. King*, Coxe 432. So, in Pennsylvania prior to the act of March 12th 1800, it was held that, "where there is a naked power to sell and they renounce, administrators *c. t. a.* have not, either at common law or by statute, authority to sell, although the object of the sale be the payment of debts:" *Moody v. Vandyke*, 4 Binn. 31; *Moody's Lessee v. Fulmer*, 3 Grant 17. So, in an action of ejectment, wherein the plaintiff claimed title through a deed from an administrator *c. t. a.*, it not appearing to the court whether the devise of the testator to his executor was a mere naked power or one coupled with an interest, it was held that the plaintiff could not recover, the court saying, "the powers of an administrator with the will annexed are the same as those which pertain to an executor *as such*;" and that, "an executor *virtute officii* at common law had no right to take possession of the lands of his testator. If they are devised they pass to the devisee, who may enter upon and take possession; if undevised they descend to the heirs, who are entitled to the possession:" *Lucas v. Doe ex d. Price*, 4 Ala. 679, 682. Nor can an administrator *c. t. a.* recover the possession of premises from a tenant thereof, who is holding over after the expiration of his term: *Floyd, Admr., v. Herring*, 64 N. C. 409. And where a bill in equity was filed to remove a cloud from title to realty caused by the deed of an administrator *c. t. a.*, the court dismissed the bill, holding, that the complainants had an adequate remedy at law, since the deed was void on its face: *Posey v. Conaway*, 10 Ala. 811. The Supreme Court of the United States, in commenting on the powers of an administrator *de bonis non* with the will annexed, who had been appointed under the Statutes of Maryland, the statutes being silent as to his powers, said: "By the common law his duties are confined to the personal estate unadministered by his predecessor. Whatever authority he may possess as to the real estate must be derived from the will. If not found there in express terms, or by necessary implication, it has no existence; hence the test in all such cases is the intention of the testator. Many of the duties enjoined upon the executors (by the will in question) were foreign to those which come within the scope of

their ordinary functions. Such powers never pass by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power, in place of the executor appointed by the will. If no provision is made by the will for such substitution, the power does not become extinguished, but the case falls within the category of those where a court of equity will not permit a trust to fail for want of a trustee, but will appoint one and clothe him with the authority adequate to the duties to be discharged:" *Ingle v. Jones*, 9 Wall. 486, 498; See also, 2 Perry on Trusts, § 500, n. 1, and 1 Williams on Ex'rs 654, n. (W<sup>1</sup>); *Brush v. Young*, 4 Dutch. 237; *Atty.-Gen. v. Garrison*, 101 Mass. 223; *Lockwood v. Stradley*, 1 Del. Ch. 298; *Besley's Estate*, 18 Wis. 451; *Abell v. Howe*, 43 Vt. 403.

§ 3. *Survivorship of Executorial Authority at Common Law—Statute of 21 Henry 8, c. 4.*—At common law when executors were vested with the authority to dispose of their testator's real estate, the death, failure, inability or refusal of one or more, less than the whole of their number, to act, wholly defeated the valid execution of the authority. To avoid the great embarrassment caused by this rule, the statute of 21 Henry 8, c. 4, was passed. This act in substance provided, that where lands were devised to be sold by executors, that those, although less than the whole number named in the will, who took upon themselves the administration of the will, should be competent to make as valid bargains and sales of the real estate devised to be sold as if all the executors named had joined. For the full text of this statute, see Important English Statutes 19. This statute, or some modified form of it, has been adopted in most of the states of this country.

The rules of law laid down as to the execution of this authority of the executors are somewhat complex, and are hardly capable of formulation into inflexible rules. This arises from the application of the rule which, in each particular case, gives effect to the lawful intent of the testator as shown by the construction and interpretation of his will. The executor's authority over the testator's real estate is divided into two classes, viz.: 1. A naked power; and, 2. A power coupled with an interest or a trust: Powell on Devises 292. Mr. Powell seems to make two exceptions under the head of naked powers on the question of the survival of the power: they are: 1st, where the authority is given by the testator, to his executors,

as executors; and 2d, where authority is given by the testator, but there is no appointment by express words what person shall sell the land; for which reason the law implies that they shall do it, who have power to pay the debts or distribute the money, viz.: the executors. In such case the executors take in their official capacity, and as the office never dies the authority survives: Powell on Devises 294, 298-9. At common law a purely naked power did not survive. So it is said of the act of 21 Henry 8, c. 4, the question has been, whether this statute extended to executors where a power to sell was given to them *nominatim*; and all the authorities agree, that if a power is given, indicating personal confidence, it must be confined to the individuals to whom it is given, and will not, except by express words, pass to others than the trustees originally named, though they may by legal transmission, sustain the same character. So it was decided in *Cole v. Wade*, 16 Ves 27, and in many other cases; *Tainter v. Clark*, 13 Met. 220, 226. Powell on Devises 294; 1 Sugd. on Powers \*146-7.

A naked power is discretionary with the donee, and no court can compel or control the execution thereof, although he leave it unexecuted; but the rule is different in the case of a power coupled with an interest or a trust. In such case a court of equity will not allow it to fail for want of a trustee: Perry on Trusts, § 248. It is apprehended that this doctrine of the court of equity just stated was the foundation of the passage of the statute of 21 Henry 8, c. 4; *Brown v. Armistead*, 6 Rand. 594, 598; *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584.

§ 4. *Reason for, and construction of Statutes which vest Executorial Authority over Decedent's Realty, in Administrators c. t. a.*—The rule that a trust shall not fail for want of a trustee, which is thought to be the foundation of the statute of 21 Henry 8, c. 4, is also the foundation of the statutes of the several states of the Union, which provide for the exercise of the same power as the executors, over their testator's real estate, by the administrators with the will annexed: *Brown v. Armistead*, 6 Rand. 594, 598; *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584, 598; *Evans v. Blackiston*, 66 Mo. 437, 439. It was said by Lord COKE, of the statute of 21 Henry 8, c. 4, "Albeit, the letter of the law extendeth only to where executors have a power to sell, yet being a beneficial law it is, by construction, extended to where lands are devised to executors to be sold:" cited in *Corlies v. Little*, 14 N. J. L. 373, 383-4.

And in this country that statute, or the substitutes therefor, are liberally construed: *Taylor v. Morris*, 1 N. Y. 341, 359; *McDowell v. Gray*, 29 Penn. St. 211. It is therefore held that the laws giving to the administrator with the will annexed the same powers as the executors is a remedial statute, and accordingly is to be liberally construed: *Drayton v. Grimke*, 1 Bailey Ch. \*392; so, where the express provisions of the law did not authorize the administrator *c. t. a.* to act in cases where the testator named no executor of his will, it was held that the case was within the reason of the law, and that the administrator *c. t. a.* might lawfully exercise a power of sale conferred by the will, though no executor was named therein: *Hester v. Hester*, 2 Ired. Eq. 330, 339; and where the statute authorized the administrator *c. t. a.* to act, if none of the executors qualified, or if having qualified they should die before sale and conveyance, it was held that he was authorized to act under the statute where only one of the executors died, and the remaining one had been removed from his office before the sale: *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584, 598.

§ 5. *The Character and Classification of such Statutes.*—The character of the statutory provisions of those states of the Union, so far as the writer has been able to examine them, which vest the executorial power over real estate in the administrator *c. t. a.*, may be divided into three classes: 1st. Those states where words expressly descriptive of realty are used by the lawgivers in giving the authority to the administrators *c. t. a.*; 2d. Those states where no words descriptive of realty are used, but a necessary implication arises from effectuating other sections of the statute which clearly refer to the exercise of executorial authority by the administrator *c. t. a.* over the testator's realty; 3d. Those states where the law provides, that the same authority shall vest in the administrator *c. t. a.* as was reposed in the executor, but there is no reference to the exercise of any authority over realty, either expressly, as in the first class, or by implication, as in the second class. The first class includes the following states: Alabama: Rev. Code, § 1609; California: Probate Act, §§ 48 & 178; Colorado: Genl. L. 1877, § 2882; Missouri: Wag. St. 93, sec. 1; New Jersey: Nix. Dig. 258, § 20; North Carolina: R. S. Ch. 46, sec. 34; Ohio: 2 Rev. St. (S. & W.) 1629, sec. 1; Pennsylvania: Purdon's Dig. 283, § 69; Rhode Island: Rev. St. Ch. 156, sec. 27; South Carolina; Tennessee: Code, sec. 2240; and Virginia. The state of Kentucky

is now included in the first class, but prior to a recent enactment it was the only state in the second class. The third class includes the states of Connecticut: Gen. Sts., p. 371, sec. 12; New York and Wisconsin: Rev. Sts. 1858, ch. 98, sec. 11. The power or authority which the administrators with the will annexed may exercise over their testator's real estate depends almost entirely on the intention expressed in the will of the testator. If no authority is given by the will to the executor, none can pass to the administrator *c. t. a.*: *Montague v. Carneal*, 1 A. K. Marsh. 351; *Ashburn v. Ashburn*, 16 Ga. 213.

§ 6. *Character and Classification of Executorial Authority over Testator's Realty.*—To determine to what extent the administrator *c. t. a.* may exercise the powers vested in the executor is a matter of no little difficulty; but it is thought that most of the cases can be reconciled. The executor "may in some instances be seised of real estate of the deceased as trustee, or be *ex officio* invested with the power of disposing of it:" 1 Williams on Ex'rs 654. SHAW, C. J., says, "the distinction seems to be between cases where the testator gives special directions to his executor as executor, or confers on him as such particular powers and trusts, and cases where the testator, having appointed one or more persons as executors, creates the same persons trustees, or gives the residue to them upon trusts specified. In the latter case the law presumes that he reposes special trust and confidence in the persons of the executors, by name or otherwise, and does not rely upon their official duty as executors. In the former it is an enlargement of the office of executor:" *Treadwell v. Cordis*, 5 Gray 341, 359. The meaning of the phrase, "in the former it is an enlargement of the office of executor," in the foregoing quotation, is, at first blush, a little perplexing. But when we remember that the learned judge was discussing the power of an executor over real estate under common and statute law, it becomes clear that he meant, by "enlargement of the office of executor," an extension of executorial power to the testator's real estate as an additional matter of administration, an authority not existing at common law in the administration and settlement of estates. From this it is apparent that the power of the executor over his testator's real estate may be divided into two classes, viz.: 1. Cases where the will vests him with the power *personally*, as a trustee; 2. Cases where the will annexes to the office of executor particular powers and trusts; these powers and trusts are only such



as belong to such an office, in the ordinary course of administration and settlement of estates ; if they are an enlargement of the office and extend beyond the ordinary course of administration the authority must be placed under the first class.

§ 7. *Character and Construction of Statutory Authority of Administrators c. t. a. over Decedent's Realty.*—This same classification of the executorial power is found in the construction of the statutes of states which vest that power in the administrators with the will annexed. In all those cases falling within the first class of executorial power above named, where the executor is vested with authority, as a trustee, it is held that the administrator *c. t. a.* cannot exercise the power.

So, where the will created a trust fund, appointing E. G. to act as trustee, and in the subsequent part of the will named the same E. G. executor of the will ; on the death of E. G. and the issuance of letters of administration *de bonis non c. t. a.*, the court said : “ the trust, though created by the will, is not thereby vested in the executrix, *qua* executrix or *ratione officii*, but given to her *nominationem*. And as the trust, therefore, is not connected by the words of the will, nor yet by any of the provisions or operation of law, with the executorship, the trust and executorship are to be viewed as if they were vested in two distinct and different persons by the words of the will,” and the administrators *d. b. n. c. t. a.* were held not to be entitled to the possession of the trust fund: *Ebert's Appeal*, 9 Watts 300, 302. So, where the testator devised unto his executors, “ all and singular the rest and residue of ” his “ estate, real and personal, *upon the trusts*, and for the purposes hereinafter named,” then declared the trusts, giving to the survivor or survivors of the trustees power to sell and convey his realty. The executors having renounced, letters of administration *c. t. a.* were issued, and a sale of land so devised was made by the administrators *c. t. a.* In an action of ejectment, the court, in deciding that the deed of the administrators *c. t. a.* was void, said, “ by force of the act of the 24th of February 1834, relating to executors and administrators, he (the administrator *c. t. a.*) may execute a power to sell in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose. \* \* \* For purposes purely administrative, the thirteenth and fourteenth sections give the devise of a power the effect of a devise of the title, and the sixty-seventh section puts an administrator with the will annexed on a footing with a surviving

*executor, but not on a footing with a testamentary trustee."* Again, "now the object of the statute was to make lands legal assets in all cases, and when a trust is created to bring it into a course of administration, it is proper that an administrator should succeed to the execution of it; but the statute was not intended for a trust unconnected with an executor's ordinary duties:" *Ross v. Barclay*, 18 Penn. St. 179; *Belcher v. Branch*, 11 R. I. 226, 229; *Brush v. Young*, 28 N. J. L. 237; *Pratt v. Stewart*, 49 Conn. 339; *Anderson v. McGowan*, 42 Ala. 285; *Tarver v. Haines*, 55 Id. 503, 509; *Harrison v. Henderson*, 7 Heisk. 315, 348-9.

The authority over the testator's real estate vested by the will in the executor, to which the administrator *c. t. a.* succeeds, is included in the second class, into which the executorial power was above divided, to wit: That authority which is annexed to, or constitutes the duties pertaining to the executorial office in the ordinary course of the administration and the settlement of estates. "It was considered by the legislature that he who had the execution of the will in regard to the personal estate, should have it also in regard to the real, in the absence of any direction in the will to the contrary, and would be a fit person for the purpose, whether nominated executor by the will or appointed administrator with the will annexed by the court of probate:" *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 598. The effect of the adoption of those laws which are similar to the provisions of 21 Henry 8, c. 4, and the statutes vesting executorial power in the administrators *c. t. a.* is thus stated by the Supreme Court of Alabama: "This statute obliterates the common-law distinction, as to survivorship and capability of execution, between a devise of lands to executors with directions to sell and a naked power of sale. Under its operation each is capable of execution by the surviving or acting executor;" and this power is extended, "to an administrator with the will annexed who would not otherwise have succeeded to it:" *Tarver v. Haines*, 55 Ala. 503, 507. "As a general rule the powers of the executor are co-extensive with the trusts created by the will. And while he is engaged in administering any and all the trusts created by the will, it must be presumed that he is acting in the capacity of executor alone, unless it plainly appears that such was not the intention; although *the duties be such as are unusual* in the course of ordinary administration:" *Mathews v. Meek*, 23 Ohio St. 272. And, "all the provisions of a will should be executed by

the administrator with the will annexed unless a contrary intention clearly appears :” *Pratt v. Stewart*, 49 Conn. 339, 341.

§ 8. *Illustrations showing when Authority vested in Executor may be exercised by Administrator c. t. a.*—In the following cases the authority given by the will was held to pertain to the office of the executor, and therefore capable of execution by the administrator with the will annexed. A contest on final settlement of account of administrators *c. t. a.*, under a will which provided that “it is my will that the shares of property which may be allotted to my children, shall be sold by my executor,” and “that my executor shall lend out the money which may arise from said sale belonging to my children.” The administrators *c. t. a.* sold the real estate, receiving confederate money; the heirs objected to the allowance of the money received on such sales in the account, but the objection was overruled: *Anderson’s Adm’r v. McGowan*, 45 Ala. 462; overruling same case, 42 Ala. 280. Action to recover proceeds of sale made under will, which “directed executor to sell real estate in one year after testator’s death, and devised avails so that his daughter should receive one-fourth thereof:” *Pratt v. Stewart*, 49 Conn. 399. Action to enjoin sale of real estate under will which provided, “executor will within one year after my decease, sell at public auction (stating terms) all the real estate I shall own at the time of my decease; from the proceeds of sale pay expenses of sickness, funeral and all my just debts;” then apply proceeds to a number of specific trusts and payment of legacies: *Kidwell v. Brummagin*, 32 Cal. 436; *Jackson v. Jeffries*, 1 A. K. Marsh. 88; *Peebles v. Watts*, 9 Dana 102. By recent statute in Kentucky, it seems that an administrator can exercise a power of sale, although it was only *discretionary with the executor*. Action to recover remainder of purchase-money on a sale made by administrator under a will “directing it to be sold by executor at ‘the death of testator’s widow,’ to the highest bidder at public auction: *Gulley v. Prather’s Adm’r*, 7 Bush 167; *s. p. Shields v. Smith*, 8 Id. 601. Action of ejectment against purchaser from administrator, who sold under a will which provided “all of the real estate, except that bequeathed to my wife, I direct and empower my said executor to have divided into seven equal parts, as nearly as may be, leaving such roads as he may deem necessary, &c., and sell the same at such time and on such terms as he may think fit, hereby empowering him to convey all my right, &c., to purchasers, and the proceeds of said

sale to be distributed in equal parts among my seven children:" *Dilworth v. Rice*, 48 Mo. 124. Ejectment by trustee of heirs, against purchaser from administrator *c. t. a.* under will, providing, "I will unto my friend C., as trustee, all my real estate for the following purposes, to be divided into lots by him, and sold by him at his discretion; proceeds I direct shall be invested in purchasing convenient lot, and erecting dwelling thereon, to be by him taken in name of my sister B. for her life, remainder to her three children, and to be equally divided between them at her death:" *Evans v. Blackiston*, 66 Mo. 437. A bill to set aside a sale made to himself by administrator, under a will providing that "a moiety of real estate" be devised "to my daughter F. for life, on her death to her husband V. for life, and on his death to his children by said daughter in fee; and when said lands should belong to said children, surviving executor or executors might make sale of real estate to make an equal division among said children, unless they (children) could all agree upon a division;" part of children were under age at time of sale by administrator *c. t. a.*: *Howell v. Sebring*, 1 McCart. Ch. 84. Where testator bequeathed and devised the whole of his lands and personal estate to his wife for her life, and after her death, the whole to be sold, "and the money arising from the sale to be equally divided between my sons and daughters:" *Smith v. McCrary*, 3 Ired. Eq. 204. Where will bequeathed to executors, in trust, \$10,000 to be put at interest by them for six years, then to be appropriated by "the executors," to the objects of the trust, the surviving executor having partly executed trust, and paid money to contractor to apply as directed by will, taking a bond for faithful performance of contract, and then resigned; the administrator *c. t. a.* was held to succeed to the management of trust, and as entitled to sue on contractor's bond for breach thereof: *Mathews v. Meek*, 23 Ohio St. 272. Will provided, "I desire and hereby direct my executors, or the survivor of them, to sell and convert into money, as soon as the same can be done on good terms and without sacrifice, all of my property, both real and personal." (specifying terms in the discretion of executors), "and to pay the money thus acquired into the hands of the trustee hereinafter named: *Elstner v. Fife*, 32 Ohio St. 358. In disposing of the responsibility of bondsmen, it was said by the court, "by the act of 12th March 1800, he (administrator *c. t. a.*) has the same powers and authorities as were conferred on the executor. If he has the

power to sell, the administrator *d. b. n. (c. t. a.)* has the same power and authority: *Commonwealth v. Forney*, 3 W. & S. 353, 356; *Meredith's Estate*, 1 Pars. Sel. Eq. C. 433. Testator's will devised his realty to wife for her life, with power to dispose of the residue after payment of specific legacies; by her will she directed her executors to sell her house and lot, same having been acquired under her husband's will; *held*, "the executors were not made testamentary trustees of the property; they were directed to sell for distribution; their duties were official by virtue of their office. When they renounced, their duties and powers devolved upon the administrator with the will annexed: *Keefer v. Schwartz*, 47 Penn. St. 503. Where will vested in executors discretionary power as to time, manner and terms of sale of his realty, the proceeds to be distributed among testator's heirs: *Evans v. Chew*, 71 Penn. St. 47; affirming *s. c.* 8 Phila. 103. Will devised house and lot to wife for life, directing if she "should desire, and my executors deem it for the best interests of my wife and children that it should be sold, they may sell the same;" it afterwards provided for the distribution of the residue among the heirs, according to laws of the Commonwealth: *Lantz v. Boyer*, 81 Penn. St. 325. Will gave power to executors "to sell and convey real estate in such manner as they shall think proper, either at public or private sale," and "to receive the purchase-money and give acquittances for the same," also directed them "to pay or transfer the one equal half part to his son," and to other legatees: *Jackman v. Delafeld*, 85 Penn. St. 381. Will directed that all just debts be paid, charged real estate with payment of legacies and annuities, expressly authorized executrix to sell real estate for payment of debts, also gave general authority to sell, and requested that no bond, or only nominal bond, be required of executrix; wife made executrix; sale by the administrator *c. t. a.* to pay debts and legacies: *Bailey v. Brown*, 9 R. I. 79; *vide also Probate Ct. v. Hazard*, 13 R. I. 3. Will directing executor to sell and convey for payment of testator's debts: *Drayton v. Grimke*, Bailey Ch. 392. Will "directed that the crops made on his lands should be used to pay his debts, with power to his executors, if necessary, or "if they think best to sell a part or any portion of his lands given to R.:" *Dougherty v. Crawford*, 14 S. C. 628 (notes of unreported cases). Will provided that "all lands be sold by executor, and the proceeds, after payment of debts, funeral expenses, costs and expenses of executing will, and pro-

viding for pecuniary bequests, be divided among children and subject to certain specific trusts:" *Harrison v. Henderson*, 7 Heisk. 315. Will devised land to testator's widow, during life or widowhood, upon her death or marriage land to be sold on certain terms "and the money to be equally divided among children;" also directed payment of his debts: *Green v. Davidson*, 4 Bax. 488. Will provided "that the executor should sell the land assigned to testator's widow as dower, and divided the proceeds among certain of his children:" *Blakemore v. Kimmons*, 8 Bax. 470. Will provided that "the land should be sold for the best price that could be got, which was directed by a power of attorney to H., of the same date," and the proceeds divided among his four sisters: *Broadus v. Rosson*, 3 Leigh 12. Will provided "that executors sell at public sale all my land, provided the said land will sell for as much, in their judgment, as will be equal to its value, and the money be placed in the hands of A.:" *Brown v. Armistead*, 6 Rand. 594. Will provided "that executors, whenever they should think best, should sell his land in B.; that the money arising therefrom, after payment of all just demands against estate," and making provision for certain legacies, "shall be equally divided between B., M. and J.:" *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584.

§ 9. *Illustrations showing when Authority vested in Executor, can not be Exercised by Administrator c. t. a.*—In the following cases the authority conferred by the will was held to be vested in the executor as a trustee, and therefore not capable of being exercised by the administrator *c. t. a.*

The will vested the executors with discretionary power as to selling the real estate of the testator, for the purpose of dividing his estate among his heirs; but, by a codicil, gave to his wife all of his personal estate; the court held that the effect of the codicil was to make the power of the executors, in effect a power to *partition realty*; the court also went on to decide, that, *admitting the power of sale was annexed to the office of executor, it did not pass to the administrator c. t. a.* under their statute: *Dominick v. Michael*, 4 Sandf. 374. (It seems to the writer that the decision of this point was not necessary to the determination of the case, and the subsequent decisions of the courts of that state regard as it as *obiter*.) The same point was considered in the case of *Conklin v. Egerton*, 21 Wend. 430, where the same view of the statute was

taken ; but, on the final decision of this case by the court of last resort, this point was expressly left undetermined : 25 Wend. 224. In the meantime, a case was decided in which the contrary view was taken, incidentally, however, to wit : That where the authority pertained to the office of executor, under the statute, "in such cases the administrator with the will annexed is probably entitled to execute all the trusts of the will, in the same manner as if he had been named therein, by the testator as the executor and trustee : " *De Peyster v. Clendining*, 8 Paige Ch. 295, 310.

The cases of *Dominick v. Michael*, and *Conklin v. Egerton*, are cited by the Court of Appeals of New York in the following cases: *Beekman v. Bonsor*, 23 N. Y. 298, 303 ; *Roome v. Philips*, 27 Id. 357, 363 ; *Bain v. Matteson*, 54 Id. 663 ; *Dunning v. Ocean National Bank*, 61 Id. 497.

The view expressed in *De Peyster v. Clendining*, *supra*, was adopted in *Bain v. Mattison*, *supra*, but the question does not seem to have come squarely before the court of last resort, until the decision of the case of *Mott v. Ackermann*, 92 N. Y. 539. In this case, the will provided "on the death of my sister Maria, or as soon afterwards as they may think advisable, taking into view the condition of the country, and the probable increase in the value of the property, and within three years from the proof of this will, I authorize, empower and direct them (executors) to convert into money all my real and personal estate, which conversion shall be treated in law as if it had happened at the time of my sister's decease." It also devised and bequeathed to her sister Maria, for life, certain real and personal estate, after her death to U., subject to the payment of legacies specified. The suit was an action for specific performance of contract of sale made by an executor, who, during the proceedings died, thus making it necessary to decide whether the administrator *c. t. a.*, in whose name the suit was revived, could execute a deed to the premises, or a trustee should be appointed to execute the deed. The court said, "we have no doubt, therefore, that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and *under the statute passes to and may be exercised by the*

*administrator with the will annexed.* That is the case before us."

While this case does not in express terms overrule the cases of *Dominick v. Michael*, and *Conklin v. Egerton*, *supra*, it must be held to do so impliedly.

A testator devised all the residue "of his real and personal estate to his executors, upon certain trusts, viz.: To continue for two years a partnership; to lease his real estate, and to make sale of the same;" a subsequent clause of the will gave a discretionary power of sale over his real estate to his executors: *Held*, that the power did not pass to the administrator *c. t. a.*: *Ross v. Barclay*, 18 Penn. St. 179. So, where the will created a trust fund, appointing C. as trustee: *Ebert's Appeal*, 9 Watts 300. Where the will provided as to a particular lot, which was mortgaged to the testator, that his executors should buy it in on sale under the mortgage, and might sell the same as they thought best for the interests of his estate, the court citing, *Ross v. Barclay*, *supra*, said the administrator *c. t. a.* might exercise "a power to sell in order to bring the land into a course of administration, but not to carry out a trust for a collateral purpose, such, for instance, as here, to turn it into money for convenience of partition:" *Waters v. Margerum*, 60 Penn. St. 39. The cases of *Ross v. Barclay* and *Waters v. Margerum*, *supra*, especially the latter, are modified in a subsequent decision by the same court. The case arose on a suit by the administrator *c. t. a.* to recover the purchase-money on a sale of testator's land, to raise a fund for division among the heirs; the will gave discretionary power as to terms of sale to the executors, as such, and they were to divide and distribute the estate between testator's heirs; the court sustained the action, and held that a power of sale to turn real estate into money for purposes of partition and distribution passed to the administrator. A power "by deed to divide the real estate among the children, so that each should have an equal share of the productive and unproductive real estate, to be left entirely to the discretion of the executors without appeal," *a power of partition of realty in specie*, was held not to pass to the administrator *c. t. a.*: *Estate of Hepburn*, 8 Phila. 206. Where the will devised rents, profits and income of real estate to his six sons, and directed his executors "to pay all just debts and expenses out of the property aforesaid, and to pay all taxes and repairs which are absolutely necessary, and to divide the rents, profits and income of the real and personal property as aforesaid," on a settlement of



the accounts of the administrator *c. t. a.*, it was sought to charge him with the amount of rents received from real estate, and he sought credit for repairs made on the real estate, but both claims were disallowed, because it was said that the power over the realty did not pass, under the law, to the administrator *c. t. a.*: *Belcher v. Branch*, 11 R. I. 226. Where the will provided, "I desire that my executors may have full power and authority to sell or lease, or dispose of in any way they may think best for my estate, all my interests in any lands, &c.," there was a number of specific trusts in the will: *Armstrong v. Park's Devisees*, 9 Humph. 195, 199, 206. The Supreme Court of Wisconsin follows the early decisions of New York state as to powers of the administrator *c. t. a.*: *In re estate of Besley*, 18 Wis. 451.

§ 10. *Meaning to be attached to "Discretion" and "Personal Trust and Confidence"*—*Miscellaneous Points*.—In many of the decisions the above words are frequently used, and in such a manner as often to confuse the casual reader. But, by recollecting what has been said in §§ 6 and 7, *supra*, the meaning of these words will be clear. An executor is a trustee, especially in equity; and these words are used indiscriminately by the courts in cases where the authority under discussion is a trust, and where it is annexed to the office. So it is that frequently the authority, although annexed to the office of executor, as such, calls for the exercise of just as much judgment, discretion and care as if vested in the executor as a trustee. The authority thus vested in the executor, *virtute officii*, is therefore distinguished into two kinds, viz.: 1. Mandatory or imperative, and 2. Discretionary: *Taylor v. Morris*, 1 N. Y. 341; *McDowell v. Gray*, 29 Penn. St. 211. This distinction, according to the most of the states, in the absence of any express enactment providing that the administrator *c. t. a.* may exercise the discretionary authority vested in the executor, does not affect his right of succession to the authority. So, where the will expressly required that *both* executors should agree to a sale of the realty, it was held that the power could be exercised by the administrator *c. t. a.*: *Meredith's Estate*, 1 Pars. Sel. Eq. Cas. 433. See also, *Evans v. Chew*, 8 Phila. 103; s. c. 71 Penn. St. 47; *Brown v. Armistead*, 6 Rand. 594; *Bailey v. Brown*, 9 R. I. 79; *Probate Court v. Hazard*, 13 R. I. 3. The statutes of *Alabama* and *Kentucky* expressly provide for such cases: *Gulley*

*v. Prather's Adm'r*, 7 Bush 167; *Shields v. Smith*, 8 Id. 601; *Anderson v. McGowan*, 45 Ala. 462.

A maxim of the common law is that, "the greater contains the less:" Broom's Legal Maxims 174. So, it is held, "a general power to sell will be conclusively presumed to be for the payment of debts:" *Chew v. Evans*, 8 Phila. 103; s. c. 71 Penn. St. 47; also for the payment of legacies: *Bailey v. Brown*, 9 R. I. 79. A sale made by an administrator *c. t. a.*, under the authority of an act passed *subsequently* to the probate of the will, is valid: *Blake-more v. Kimmons*, 8 Baxter 470.

As we have already seen, an administrator *c. t. a.* must be appointed *by a court* of competent jurisdiction: § 2, *supra*. The authority of any court cannot extend beyond the territorial limits of its sovereignty, and the laws of one state cannot govern the disposition of real estate situate in another state. It is therefore held, that an administrator with the will annexed, duly appointed by a court of competent jurisdiction in one state, cannot make a valid contract of sale of his testator's real estate situate in another state: *Wills v. Cowper*, 2 Ham. 124; *Simpson v. Hawkins*, 1 Dana 303.

When the authority is annexed to the office of the executor, a renunciation of that office deprives him of his authority: *Eltner v. Fife*, 32 Ohio St. 358, 369. As the authority which the administrator with the will annexed succeeds to is that which is annexed to the office of executor, his renunciation ends his authority to make sale or conveyance of his testator's real estate: *Eltner v. Fife*, *supra*, 372; *Owens v. Cowan's Heirs*, 7 B. Mon. 152, 157.

"When the mode of executing the power is not defined, it may be executed in any manner sufficient to convey the subject-matter, and the power need not be referred to in the instrument executing it:" 4 Kent's Com. 330, 333, 334; 1 Sugden on Powers 247, 404. "Executors having a general power of sale are not restricted to any particular mode of selling: *Huger v. Huger*, 9 Rich. (Ch.) 217, 221, 238; 2 Washb. R. P. 663; *Christy v. Pulliam*, 17 Ill. 59, 61; *Bonney v. Smith*, Id. 531, 533; *Bond v. Zeigler*, 1 Kelley 324. So where it was contended that an administrator *c. t. a.* should have sold at *public sale* instead of at *private sale*, there being *no provision in the will* in regard to the matter, the objection was not sustained: *Moss v. Moorman's Adm'r*, 24 Gratt. 96, 110.

§ 11. *Application of Purchase-money*.—"It has long been settled that either upon a trust or a charge a purchaser is not bound to see that the money is applied either to the payment of debts generally, or to the satisfaction of legacies out of the surplus after the debts are paid. The reason is, that it would defeat a sale if the law obliged a purchaser to attend to the execution of a trust so indefinite as the payment of all debts, which he would have no means of ascertaining. Legacies out of the fund stand on the same footing, because the purchaser would necessarily have to go through the administration of the assets and see at his risk that the debts are paid before he could let the legatees have anything." *Hauser v. Shore*, 5 Ired. Eq. 357, 362; 2 Williams on Ex'rs 935; *Elliot v. Merryman*, 1 Lead. Cas. in Eq. 59, 67, and note, p. 112. "Like reason doth make like law:" Broom's Maxims 154. Accordingly the same rule would seem to extend to administrators *c. t. a.*; *Evans v. Chew*, 8 Phila. 103; s. c. 71 Penn. St. 47, 51.

JAMES H. BROWN.

Denver, Col.

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## RECENT AMERICAN DECISIONS.

### *Supreme Court of Ohio.*

#### ST. CLAIR STREET RAILWAY CO. v. EADIE.

A minor child, who being *sui juris* as to a reasonable care of her person and safety lawfully and properly enters into a conveyance driven by her parent, and without fault on her part is injured by the negligence of the driver of another vehicle, is not prevented from recovering damages against the proprietor of the latter vehicle, because her parent has by his negligence contributed to the injury.

*Transfer Co. v. Kelly*, 36 Ohio St. 86, followed. *Thorogood v. Bryan*, 8 C. B. 115, disapproved.

ERROR to the District Court of Cuyahoga County.

This was an action for damages for an injury alleged to have been caused by defendants' negligence. The plaintiff was a minor, aged sixteen years, and was fully capable of taking reasonable care of herself. She was lawfully riding with her father, who was driving his own wagon, when she was injured by a collision between the wagon and a street-car, caused by the mutual and concurring negligence of a street-car driver and her father, but without any fault or negligence on her part. The court below held that the negligence